UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

RUDOLPH A. BUCKLEY, M.D.,

Plaintiff,

-vs-

SLOCUM-DICKSON MEDICAL GROUP, PLLC, as successor in interest to **SLOCUM DICKSON MEDICAL GROUP, P.C.**,

Defendant.

Civil Action No.:
6:10-CV-00974 (DNH-ATB)

DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S SECOND MOTION FOR ATTORNEYS' FEES

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INTRODUCTION

This Court is familiar with the facts underlying this matter. Facts specifically relating to plaintiff Rudolph A. Buckley, M.D.'s ("Plaintiff" or "Dr. Buckley") Motion for an Award of Post-July 29, 2013 Attorneys' Fees ("Second Motion") are set forth in detail in the accompanying affidavit of Anthony J. Piazza.

Briefly, Plaintiff's Second Motion should be denied in its entirety on the following grounds:

- Plaintiff's application is improper because such a request must be directed to the Second Circuit, not the District Court;
- The Second Circuit did not mandate or find that Plaintiff was entitled to appellate counsel fees;
- Plaintiff's application is untimely because Defendant paid the entire judgment (totaling more than $666,000) in November 2014, and Plaintiff did not move within 14 days of the Satisfaction of Judgment being filed (in fact, Plaintiff waited more than three months to file this motion);
- Significantly, a disbarred attorney was permitted to perform a significant share of the total work on appeal (in excess of 75% of the total fees allegedly incurred), which constitutes the unauthorized practice of law by a non-attorney and which warrants denial of Plaintiff's entire fee application;
- Plaintiff is not entitled to any counsel fees related to the prosecution of his cross appeal, which was unsuccessful before the Second Circuit;
- Plaintiff has not submitted billing records that were created contemporaneously with the work performed (Plaintiff's counsel concedes that the invoices submitted to the Court have been "modified" before submission to the Court);
- The fees requested by Plaintiff are nearly $40,000 higher than those previously submitted to the Defendant for reimbursement, which Plaintiff's counsel had previously represented were "more than" sufficient to compensate Plaintiff for the appellate work;
- Plaintiff is not entitled to fees for work that is excessive, redundant or otherwise unnecessary, or where the time entries are vague and/or incomplete to allow a determination as to whether the services were reasonable and necessary; and
- Plaintiff is seeking reimbursement for an unreasonable hourly rate.

ARGUMENT

POINT I

PLAINTIFF'S FEE APPLICATION IS UNTIMELY AND NOT PROPERLY BEFORE THIS COURT

In the first instance, Plaintiff's Second Motion is improperly before this Court and untimely and should be denied for these reasons alone.

On October 14, 2014, the Second Circuit issued its Mandate. (Dkt. No. 59). The Mandate does not remand any proceedings to this Court, for attorney's fees or otherwise, but simply affirms this Court's ruling that it was "correct to grant Buckley's motion for summary judgment" and request for attorneys' fees. (Dkt. No. 59).

If the Second Circuit determined that appellate counsel fees were warranted in this case (especially since the Court was familiar with the arguments raised by each party, including Plaintiff's original request for attorneys' fees), the Second Circuit would have included a directive for Plaintiff to seek such fees before the district court. *See Quarantino v. Tiffany & Co.*, 166 F.3d 422, 428 (2d Cir. 1999) ("[s]econd, we direct the court to include in the final award, upon the timely filing of a supplemental application in suitable form, reasonable attorney's fees for services rendered in the successful prosecution of this appeal."); *Big Tree Enters. v. Mabrey,* 1994 U.S. App. LEXIS 36669 (10th Cir. 1994) ("[w]e therefore remand to the district court with instructions to determine reasonable attorneys' fees to be awarded Plaintiffs for the preparation of this appeal.").

Absent remand, a district court in this Circuit is not authorized to determine in the first instance whether an award of attorneys' fees is warranted for the appellate phase of the proceedings. *See Smith v. Bowen*, 867 F.2d 731, 736 (2d Cir. 1989) ("[a]pplications for appellate fees in this Circuit should be filed directly with the Court of Appeals."). In *McCarthy v. Bowen*, the Second Circuit held that, "[w]hen fees are sought for [an] attorney's services rendered in connection with an appeal, the court of appeals is the appropriate court to determine" whether the conditions for making a fee award have been satisfied. 824 F.2d 182, 183 (2d Cir. 1987) (per curium). Any request for appellate fees "should therefore ***always*** be presented to the Court of Appeals." *Id.* (emphasis supplied).

District courts in this state have consistently denied appellate counsel fee applications that were directed to the district court, as opposed to the circuit court. *See e.g. Brady v. Wal-Mart Stores, Inc.*, 2010 U.S. Dist. LEXIS 115380 (E.D.N.Y. 2010); *Eames v. Sullivan*, 1994 U.S. Dist. LEXIS 13501, *4-5 (W.D.N.Y. 1994); *Eames v. Bowen*, CIV-81-0483E (W.D.N.Y. 1989); *see also Director, Office of Workers' Comp. Programs v. Kyle*, 493 U.S. 887 (1989).

The Federal Rules of Appellate Procedure confirm that such applications must be directed to the circuit court. Under Fed. R. App. P. 41(a), any Mandate to the district court is required to set forth "any direction about costs." Absent such direction in the Mandate, the Federal Rules of Appellate Procedure provide only a very narrow window of discretion for the district court to tax costs, limited to the four categories of administrative expenses specifically itemized in Fed. R. App. P. 39(e) ("Costs on Appeal Taxable in the District Court"). The Federal Rules of Appellate Procedure , therefore, do not provide any authorization for the district court to consider appellate fees in this case. *See Davidson v. City of Avon Park*, 848 F.2d 1172, 1173 (11th Cir. 1988) ("We hold that the district court is not authorized, by local rule or otherwise, to control the filing time or assessment of attorney's fees for services rendered on appeal."); *Butts v. Astrue*, 565 F. Supp.2d 403, 404 (N.D.N.Y. 2008) (same).

In this case, the Second Circuit did not consider and, indeed, was not asked to consider, whether Plaintiff was entitled to an award of attorneys' fees for the appellate phase of this litigation. (*See* App. Dkt. No. 53). The record establishes that Plaintiff did not request an award of fees for appellate work in the Second Circuit, did not raise the issue in his briefing or argument before the Second Circuit, and did not even submit a bill of costs to the Second Circuit at the conclusion of his appeal. Plaintiff's Second Motion should be denied accordingly.

Also, it bears noting that, even if Plaintiff had properly moved for appellate counsel fees before the Second Circuit and assuming Plaintiff is moving for counsel fees pursuant to the Federal Rules of Civil Procedure (once again, Plaintiff has failed to identify the procedural basis pursuant to which counsel fees are sought), Plaintiff's Second Motion should be denied because it was not filed in a timely fashion. Rule 54 (d) of the Federal Rules of Civil Procedure states that a claim for attorneys' fees shall be made by motion and, absent a statute or court order providing otherwise, shall be filed not later than 14 days after entry of judgment. Accordingly, this limitations period commenced on November 25, 2014, with the filing of Plaintiff's Satisfaction of Judgment (Dkt. No. 60), and expired on December 8, 2014.

However, Plaintiff waited until December 16, 2014, or 8 days after the 14-day limitations period had lapsed, to request this Court's permission to file an application for "appellate attorneys' fees." (Piazza Aff., Ex. B). This Court never granted Plaintiff permission to file his Second Motion. Nevertheless, Plaintiff then delayed the filing of the instant motion for an additional three months. (Dkt. No. 61). Courts have consistently denied untimely motions for attorneys' fees, especially where, as here, the moving party never moved to extend the time to file such an application. *See Horsford v. The Salvation Army*, 2002 U.S. Dist. LEXIS 18453 (S.D.N.Y. 2002) (fee application denied as untimely and court would not retroactively extend deadline where motion had not been made explaining the delay except in reply papers); *see also Weyant v. Okst*, 198 F.3d 311, 315 (2d Cir. 1999).

Since Plaintiff did not seek appellate counsel fees from the Second Circuit, nor was Plaintiff's Second Motion timely, this Court should deny Plaintiff's motion in its entirety.

POINT II

THE COURT SHOULD DENY PLAINTIFF'S MOTION FOR ALLOWING A DISBARRED ATTORNEY TO ENGAGE IN THE UNAUTHORIZED PRACTICE OF LAW

Plaintiff's motion should also be denied entirely because a significant amount of the services rendered – 448.8 hours of work, or 78.3% of the total billings – were performed by a disbarred attorney who appears to have been engaging in the practice of law. There is no dispute that Edward Sinker was disbarred from practicing law in New York due to his "submission of a false insurance claim to the Allstate Insurance Company and his obtaining the sum of $76,000." *Matter of Sinker*, 209 A.D.2d 85, 86 (4th Dep't 1995). The Fourth Department held that Sinker's conviction of a federal mail fraud charge was the equivalenc of a class C felony. *Id.*

As explained below, not only should this Court disallow any services rendered by that disbarred attorney (Mr. Sinker), but this Court should deny Plaintiff's entire fee application for allowing Mr. Sinker to engage in the unauthorized practice of law. A party is not entitled to *any fees* where an attorney has engaged in misconduct by violating the Disciplinary Rules, such as, as relevant here to the work performed by Plaintiff's counsel, aiding in the unauthorized practice of law. *See Chen v. Chen Qualified Settlement Fund*, 552 F.3d 218, 225 (2d Cir. 2009), quoting *Shelton v. Shelton*, 151 A.D.2d 659 (2d Dep't 1989).

A. **Only Lawyers May Practice Law:**

Only attorneys may practice law in New York. *See* N.Y. Jud. Law §§ 478, 484, 486. Under its Local Rules, this Court must "enforce the New York Rules of Professional Conduct." N.D.N.Y. Local Rule 83.4(j). To that end, "[a]ny attorney who has been disbarred from the bar of a state in which the attorney was admitted to practice shall have his or her name stricken from the roll of attorneys of this Court." N.D.N.Y. Local Rule 83.4(f).

In *Matter of Rosenbluth*, 36 A.D.2d 383 (1st Dep't 1971), the First Department observed that, "[a] suspended or disbarred attorney holds approximately the same status as one who has never been admitted." A disbarred attorney is deemed a non-attorney and cannot engage in activities that would constitute the unauthorized practice of law. *See* N.Y. R. Prof. Conduct 5.5, 22 N.Y.C.R.R. § 1200; *see also* 22 N.Y.C.R.R. § 1022.27; N.Y. Jud. Law §§ 478, 484, 486.

New York has taken great pains to ensure that disbarred attorneys no longer engage in the practice of law. Under Judiciary Law § 90(2), the Appellate Division is required to insert in every order of suspension or disbarment, such as the one issued to Mr. Sinker, a decretal provision that the offending attorney must "desist and refrain from the practice of law in any form, **either as principal or as agent, clerk or employee of another**." *Id*. (emphasis supplied); *see Matter of Sinker*, 209 A.D.2d 85, 86 (4th Dep't 1995).

"The practice of law involves the rendering of legal advice and opinions directed to particular clients." *Matter of Rowe*, 80 N.Y.2d 336, 340 (1992) (e.g., "advice to a particular person" or "intended to respond to known needs and circumstances" of that person or a specific group). "[W]hen legal documents are prepared for a layman by a person in the business of preparing such documents, that person is practicing law." *Matter of Roel*, 3 N.Y.2d 224, 229 (1957).

Under the Judiciary Law, "[n]o natural person shall ask or receive, directly or indirectly, compensation for . . . preparing . . . pleadings of any kind in any action brought before any court of record in this state, *or make it a business to practice for another as an attorney* in any court or before any magistrate unless he has been regularly admitted to practice, as an attorney or counsel, in the courts of record in the state." N.Y. Jud. Law § 484 (emphasis supplied). When a person engages in the unauthorized practice of law, fees charged to the client for those activities are forfeited and, therefore, uncollectable. *See Spanos v. Skouras Theatres Corp.*, 364 F.2d 161 (2d Cir. 1966); *Farb v. Baldwin Union Free Sch. Dist.*, 2011 U.S. Dist. LEXIS 109006 (E.D.N.Y. 2011).

B. "A Lawyer Shall Not Aid A Non-Lawyer In The Unauthorized Practice Of Law":

It is incumbent upon admitted attorneys to abide by the various ethical cannons and statutory rules in their dealings with non-attorneys and, to a much greater extent, with disbarred attorneys.

In New York, an attorney is not permitted to encourage or aid in the unauthorized practice of law, including the drafting of legal papers. *See Matter of Sobolevsky*, 430 F. App'x 9, 18 (2d Cir. 2011) (**"Sobolevsky's explanation that at least some of the briefs in question were drafted by non-lawyers, and filed without his review, amounts to a clear concession that [he] aided the unauthorized practice of law…**"); *see also Matter of Caracas*, 171 A.D.2d 358 (2d Dep't 1991) (attorney disciplined who "allowed an employee," not admitted anywhere as an attorney, "to consult with a client and to prepare legal papers for the client," who "was unaware . . . that the employee was not admitted to the practice of law"); *Matter of Mason*, 208 A.D.2d 1 (1st Dep't 1995) (attorney "improperly facilitated the practice of law" by allowing non-lawyer to, *inter alia*, draft court complaints); *Matter of Sutherland*, 252 A.D. 620 (1st Dep't 1937) (attorney disciplined who "permitted and requested" disbarred attorney "to perform the duties of a law clerk on numerous occasions").

Indeed, admitted attorneys are strictly prohibited from aiding suspended or disbarred lawyers in continuing their practice of law. *See* N.Y. R. Prof. Conduct 5.5(b), 22 N.Y.C.R.R.

§ 1200 ("A lawyer shall not aid a non-lawyer in the unauthorized practice of law."); *Matter of Reily*, 101 A.D.2d 351 (2d Dep't 1984); *Matter of Kuriakose*, 171 A.D.2d 358 (2d Dep't 1991) (disciplining an attorney for aiding a non-lawyer in consulting with and preparing legal papers for a client). Doing so is grounds for suspension (*Matter of Takvorian*, 240 A.D.2d 95 (2d Dep't 1998)), and for discharging the admitted attorney for cause (*Coccia v. Liotti*, 70 A.D.3d 747 (2d Dep't 2010)).

Instructive here is *Farb v. Baldwin Union Free Sch. Dist.*, 2011 U.S. Dist. LEXIS 109006 (E.D.N.Y. 2011). In that case, former counsel for the prevailing party moved for an award of attorneys' fees for work the attorney and members of his firm performed. *Id*. at 1-2. One of the members of the firm for whom fees were sought was a disbarred attorney. *Id*. at 13-14. The disbarred attorney performed such tasks as meeting with the client to review the facts of the case, legal research, drafting court documents, reviewing and revising parts of the complaint, advising and opining on litigation strategy, and fielding numerous telephone calls. *Id*. at 14-17. The court, citing New York law, held that, "**activities such as 'preparing legal memoranda,' even if signed by an admitted attorney**," are strictly "**forbidden to a suspended or disbarred lawyer**." *Id*. at 33-35 (emphasis supplied), *quoting Matter of McClain-Sewer*, 77 A.D.3d 204 (1st Dep't 2010) ("[R]espondent continued to perform substantial legal work…, preparing legal memoranda and documents to be filed in court…, and being compensated for that work through other attorneys in good standing under whose names that work was submitted.").

Because the disbarred attorney in *Farb* had performed legal work on the matter and because the licensed attorney who made the fee motion permitted the disbarred attorney to work on the matter, the court deemed this a "substantial breach of a legal and ethical duty" warranting forfeiture of all legal fees. *Id*. Consequently, the fee motion was denied in its entirety; the court declined to impose any fee award, even for work performed by duly-licensed attorneys. *Id*. at 47.

C. Mr. Sinker Is Practicing Law; Plaintiff's Attorneys Are Aiding Mr. Sinker's Unauthorized Practice Of Law:

Mr. Sinker submits an affidavit in support of Plaintiff's fee application where he gives his own "legal opinion" as to the propriety of the legal services he allegedly performed for Plaintiff. (Dkt. No. 61-2). In support of his argument, Mr. Sinker cites *Matter of Rowe*, 80 N.Y.2d 336 (1992). (Dkt. No. 61-2). In *Rowe*, the Court allowed a disbarred attorney to publish a law review article because it was not directed towards one particular client and was not considered legal advice. *Id*. at 341-342. The case does not hold that a disbarred attorney may seek employment as a paralegal representing clients in a law firm. In fact, the terms "paralegal," "law clerk" and "legal assistant" do not appear anywhere in the Court's decision. Moreover, the instant motion does not concern the publication of a law review article.

Plaintiff's attorneys argue that *Matter of Rosenbluth*, 36 A.D.2d 383, was cited "approvingly" by the Court of Appeals in *Matter of Roe* "for the proposition that the [lower court] in *Rowe* had 'improperly prohibit[ed] [the disbarred attorney] from engaging in endeavors which he could have undertaken had he never been admitted to the Bar in the first place.'" *See* Plaintiff's Memorandum of Law, p. 15 (brackets in original). In *Rosenbluth*, the Appellate Division permitted a **suspended** attorney to run a **calendar watching service**. 36 A.D.2d at 385. Mr. Sinker is not running a calendar watching service – he is practicing law.

The relevant authorities run counter to Mr. Sinker's legal analysis. In *Matter of Wolfram*, the committee on Professional Ethics of the Bar Association of Nassau County considered the question of whether an attorney in good standing may employ a disbarred attorney, in the capacity of a paralegal, to handle document drafting, research and organization of files. Nass.

Cnty. Op. No. 92-15. The Nassau County Opinion considered various legal authorities, and observed that "the statutory and code provisions . . . impliedly place greater restrictions upon the ability of a disbarred lawyer from earning a living by use of his or her training and talent and experience than are encountered by non-lawyers generally." *Id*.

The attorney in *Wolfram*, following his five-year suspension from the practice of law, also filed a motion in the Appellate Division, Second Department, for "permission to be employed in a law office as a paralegal, law clerk or legal research assistant during the period of his suspension." *Matter of Wolfram*, 11/27/89 N.Y.L.J. 6. (2d Dep't 1989). That motion was summarily denied. Unlike the suspended attorney in *Matter of Wolfram*, Mr. Sinker has been permanently disbarred and denied reinstatement.

In N.Y. Cnty. Op. No. 666 (1985), the New York County Lawyers Association was asked what duties and functions may be undertaken by a disbarred lawyer. The Committee concluded that, "it is improper for a licensed lawyer to employ a disbarred lawyer for any purpose, or in any capacity, related to the practice of law." *Id*. The rationale is that "such employment . . . runs counter to the intent of the order imposing discipline." *Id*.

In Formal Opinion 1998-1, the Association of the Bar of the City of New York was asked to determine "under what circumstances, if any, may an attorney in good standing employ a disbarred or suspended attorney to work in a law office." NYC Op. No. 1998-1. The opinion discusses a number of New York authorities, including *Rosenbluth* and *Wolfram*, and offers the following observations: "While Rosenbluth won relief in precisely that fashion to enable him to run a calendar watching service, it is noteworthy that, without elucidation, **the Second Department denied Wolfram's motion to allow him 'to be employed in a law office as a paralegal, law clerk or legal research assistant**.'" *Id*. (emphasis supplied), *citing Wolfram*, Nass. Co. 92-15. The Opinion then concludes: "**It is clearly improper for a lawyer or law firm to employ a disbarred or suspended attorney in any capacity related to the practice of law.**" *Id*. (emphasis supplied).

Curiously, Mr. Sinker also cites N.Y. Cnty. Op. No. 1998-1, as well as NYSBA Eth. Op. 255 (from 1972), in his affidavit. (Dkt. No. 61-2, ¶ 4). Mr. Sinker then affirms that these "two ethics opinions further confirm that [he is] doing absolutely nothing wrong, improper, unethical, or illegal as a paralegal." (Dkt. No. 61-2, ¶ 5).[1] However, it is respectfully submitted that Mr. Sinker is improperly engaging in the practice of law.

Mr. Sinker is not writing a law review article, nor is he running a calendar watching service or organizing files. Rather, he spent an excessive number of hours researching and writing legal memoranda, briefs and affidavits that have been filed with this Court and the Second Circuit, giving legal advice to his colleagues, and preparing attorneys for oral argument. *Matter of Wolfram*, Nass. Co. Op. 92-15; *and see Farb*, 2011 U.S. Dist. LEXIS 109006 (discussed *supra*). The *evidence* and *authorities* relied on by Mr. Sinker completely discredit his position.

In fact, the Grievance Committee has already cautioned Mr. Sinker not to "engage in conduct which gives the appearance that [he is] licensed to practice law." (Dkt. No. 61-2). In response to this admonition, Mr. Sinker assured the Grievance Committee that he would only undertake "paralegal research." (Dkt. No. 61-2). His promises notwithstanding, Mr. Sinker's time entry for January 31, 2014 reads: "**Legal research on doctrine of appealability and ability of Second Circuit to sit in review of itself.**" (Dkt. No. 61-1) (emphasis supplied).

Notably, Mr. Sinker's time entry in direct conflict with Mr. Deery's own affidavit, where

[1] Mr. Sinker cites these two ethics opinions in his affidavit, but Plaintiff's Memorandum of Law implies that little if any weight should be given to ethics opinions. *See* Plaintiff's Memorandum of Law, p. 15.

he represents to this Court that Mr. Sinker "is strictly providing paralegal and/or clerical services to the firm." (Dkt. No. 61-1, ¶ 15). Then again, Mr. Deery admits in that same affidavit, indeed on the very next page, that Mr. Sinker is performing "substantive legal work." (Dkt. No. 61-1, ¶ 19). These positions are irreconcilable.

Mr. Deery also makes the following claim in his affidavit: "Sinker has avoided even the appearance of practicing law." (Dkt. No. 61-1, ¶ 20). The evidence conclusively establishes that the overwhelming majority of the work performed in this case was undertaken by Mr. Sinker. (Dkt. No. 61-2). Of the 573.2 hours billed during the appellate phase, 448.8 hours, or 78.3% of all hours entered, are attributable to Mr. Sinker. As the lead attorney in the appellate phase, Mr. Deery's time entries account for 113.4 hours, or less than 19.8% of all time entered. At just 11 hours, Mr. Kowalczyk was a passive observer in this action. To put this into context, 69% of all fees sought in connection with the Second Motion are attributable to Mr. Sinker. Needless to say, we have not been able to locate any case where a paralegal was responsible for 69% of all legal fees sought, much less 78% of all hours recorded. Such percentages, however, would surely be expected of the lead attorney.

Lastly, Mr. Sinker attests to the "accuracy and "propriety" of his "portion of the billings submitted upon this application." (Dkt. No. 61-2). It bears repeating that Mr. Sinker's disbarment "arose from [his] submission of a false insurance claim to the Allstate Insurance Company and his obtaining the sum of $76,000." *Matter of Sinker*, 209 A.D.2d at 86. There are countless discrepancies in Mr. Sinker's time entries. Thus, his attestation should carry no weight with this Court.

D. Plaintiff Is Not Entitled to An Award of Any Counsel Fees Given Mr. Sinker's Role In this Case:

"New York courts have consistently held that 'an attorney who engages in misconduct by violating the Disciplinary Rules is not entitled to legal fees ***for any services rendered***.'" *Chen v. Chen Qualified Settlement Fund*, 552 F.3d 218, 225 (2d Cir. 2009) (emphasis added), quoting *Shelton v. Shelton*, 151 A.D.2d 659 (2d Dep't 1989).

Mr. Sinker was the *de facto* attorney in this matter, undertaking the crux of the research, the drafting of the appellate briefs, and even preparing Mr. Deery for oral argument. Mr. Deery must also shoulder the responsibility for aiding the unauthorized practice of law by a disbarred attorney. Allowing a disbarred attorney to perform such significant legal activities in an appeal before the Second Circuit Court of Appeals – again, more than 78% of all the services were performed by Sinker – should not be countenanced by this Court. The parties to this lawsuit, opposing counsel, the Court and even the supervising attorneys at Plaintiff's law firm should not be put in a position of having to rely upon the factual and legal analysis of a person who has been disbarred by the State of New York after having been convicted of a federal offense involving the submission of a false insurance claim.

Plaintiff's counsel did not simply facilitate the practice of law by Mr. Sinker, they flat-out allowed Sinker to perform most of the legal work. Considering the disproportionate amount of time spent on the file by Sinker and lead counsel Deery (78% versus 19%), there are serious questions as to whether counsel could have properly and adequately supervise all of the legal research and writing that Sinker performed. As such, it appears that Plaintiff's attorneys "crossed the line between appropriate reliance on an assistant and abdication to a non-lawyer of the lawyer's responsibility to the client." *Matter of Parker*, 241 A.D.2d 208, 211 (1st Dep't

1998). That Plaintiff seeks compensation for these major ethical violations is not only disappointing, but contrary to established law.

For the reasons set forth herein, it is submitted that Plaintiff's Second Motion should be denied in its entirety, with prejudice. To the extent the Court is permitted to "entertain" any part of Plaintiff's application, it is submitted that those billings attributable to Mr. Sinker should be denied, along with Mr. Deery's billings for supervising Mr. Sinker. To the extent this Court believes Plaintiff's legal representatives engaged in or otherwise facilitated the unauthorized practice of law, the Second Motion should be denied in its entirety.

POINT III

PLAINTIFF IS NOT ENTITLED TO ANY FEES PURPORTEDLY INCURRED IN CONNECTION WITH HIS CROSS APPEAL

Even if this Court were to consider Plaintiff's Second Motion, he would not be entitled to reimbursement of counsel fees incurred in connection with his unsuccessful cross appeal. Plaintiff essentially conceded this point already – in a letter from Plaintiff's counsel on November 6, 2014, Plaintiff's counsel indicated that he reduced his invoices from $65,856.67 to $60,000.00, which "more than compensates for Appellate work on the Cross Appeal." (*See* Piazza Aff., Exh. A). In Plaintiff's Second Motion, he does not remove, or even attempt to remove, time entries related to the unsuccessful cross appeal (nor does Plaintiff explain how counsel fees somehow ballooned to nearly $100,000 when Plaintiff previously sought $60,000 from Defendant following the decision from the Second Circuit).

It is well settled that a litigant is "not entitled to recover attorneys' fees for [his] unsuccessful claims." *New York State Ass'n of Realtors v. Shaffer*, 898 F. Supp. 128, 131 (E.D.N.Y. 1995). Moreover, "[w]here the record does not permit the Court to ascertain the exact number of hours attributable to non-meritorious claims, the Court may rely upon its best judgment and familiarity with the case, having in mind that one of the most important criteria to be considered is the degree of success that the plaintiff achieved in the overall litigation." *Orshan v. Macchiarola*, 629 F. Supp. 1014, 1020 (E.D.N.Y. 1986) ("In this case, to avoid a windfall for hours expended on unsuccessful claims and to account for duplication of effort, Gross' remaining hours will be reduced by 25%.").

In *Harper v. BP Exploration & Oil, Inc.*, 3 F. App'x. 204 (6th Cir. 2001), the Court held that the relation of a cross appeal to a plaintiff's successful claim is insignificant for determining an award of attorney fees for appellate work. The plaintiff in *Harper*, much like the Plaintiff herein, sought "to secure relief on claims on which he was not the prevailing party." *Id.* at 208. The Court held that, "[o]nce the district court rendered its judgment, the claim on which [the plaintiff] did not succeed . . . became distinct from those claims on which he did prevail." *Id.* Because such claims remain distinct and separable, "the rationale for awarding attorneys' fees to a plaintiff seeking to defend his judgment on appeal…has no force in the context of a plaintiff attempting to increase the scope of his victory by obtaining a reversal of a portion of the trial court's judgment." *Id.*

In other words, a plaintiff may not recover attorneys' fees for those "claims in the cross appeal" because "there he seeks to secure relief on claims on which he was not the prevailing party." *Id.*; *see also Barber v. Louisville & Jefferson County Metro. Sewer Dist.*, 2009 U.S. Dist. LEXIS 14258, *9-10 (W.D. Ky. 2009).

Plaintiff's instant motion for attorneys' fees is based on the assertion that he was the prevailing party on appeal. However, the Second Circuit, also denied Plaintiff's cross appeal and affirmed this Court's previous award of attorneys' fees. (Dkt. No. 59). Accordingly, Plaintiff was not the prevailing party on his cross appeal. Defendant successfully argued that the fees awarded by this Court were reasonable and that Plaintiff's attorneys were not entitled to an upward modification of that award. The Second Circuit agreed. (*See* Dkt. No. 59 (affirming this Court's award of $47,723.00)).

For the reasons set forth above, Plaintiff's Second Motion should be denied in its entirety. The fact that Plaintiff now seeks $97,695.25 in fees in connection with an appeal, in which he had previously been awarded fees of $47,723.00 for litigating the case through summary judgment, is unconscionable. To the extent this Court is willing to entertain a fee award, it should, as detailed below, deduct from the total amount any time attributable to Mr. Sinker, as well as Mr. Deery's supervision of Mr. Sinker's work. The Court should also apply across-the-board deductions for the various other reasons set forth below.

POINT IV

THE AMOUNT OF PLAINTIFF'S FEE REQUEST IS UNREASONABLE

Even if this Court were to consider Plaintiff's untimely and improper fee application, the amount requested is patently unreasonable. On November 6, 2014, Mr. Deery advised Defendant that he had reduced his "$65,856.67 bill to $60,000.00" because this reduced amount would "more than compensate[] for Appellate work on the Cross Appeal." (Piazza Aff., Ex. A). Now, however, Plaintiff is seeking $97,695.25 for work allegedly performed in connection with the appeals. (Deery Aff., ¶ 10).

As set forth below, the fees are unreasonable as a matter of law on a number of grounds.

A. Inadequate Billing Records:

At the outset, the bills submitted by Plaintiff's attorneys are inappropriate. The courts require a plaintiff to submit billing records made **contemporaneously** with the work performed. *See New York State Ass'n for Retarded Children v. Carey*, 711 F.2d 1136, 1147-48 (2d Cir.

1983); *Gen Star Indem. V. Custom Editions Upholstery*, 940 F. Supp. 645, 653 (S.D.N.Y. 1996) ("Even if contemporaneous records are not required, this court cannot rely on an admittedly 'speculative,' 'reconstructed hourly bill' to set compensation."). The records submitted by the Plaintiff's attorneys are not contemporaneous billing records.

Indeed, Mr. Deery states in his affidavit that "these bills have . . . been modified by the Firm" prior to submitting them to the Court. (Deery Aff., ¶ 7(a)). By Mr. Deery's own admission, the charges contained in the fee application are not the actual time entries made by counsel and his staff when the work was performed. In certain instances, the charges in the records submitted by Mr. Deery differ from the charges previously forwarded to counsel. (*Compare* Piazza Aff., Ex. A *with* Dkt. No. 61-1).

Furthermore, the billing records are not segregated in terms of the time recorded in defending the appeal, versus the time required to perfect Plaintiff's cross appeal. (Dkt. No. 61-1). As explained above, if this Court determines that Plaintiff is entitled to recover any fees in connection with his Second Motion, those fees should be limited to the work performed in defending the appeal, not prosecuting the cross appeal. *See* Point II (*supra*).

Since Plaintiff's attorneys have failed to submit the actual, contemporaneous and itemized records, the application should be denied altogether, or reduced substantially.

B. Excessive, Vague, Incomplete and Unnecessary Fees:

Plaintiff is also not entitled to fees for work that is excessive, redundant or otherwise unnecessary, or where the time entries are vague and/or incomplete to allow a determination as to whether the services were reasonable and necessary.

Although the court is not required to "scrutinize each action taken or the time spent on it," *see Aston v. Sec'y of Health & Human Servs.*, 808 F.2d 9, 11 (2d Cir. 1986), the court has a duty to discount any "exorbitant, unfounded, or procedurally defective fee applications" and ensure the final award is reasonable. *See Comm'r, I.N.S. v. Jean*, 496 U.S. 154, 163 (1990).

Where, as here, there are many charges that appear to excessive, unreasonable and/or exorbitant, the court is permitted to significantly limit or reduce the fees sought by the moving party. *See e.g. Hensley v. Eckerhart,* 461 U.S. 424 (1983) (the court can apply a significant downward modification to a claimed attorney fee award based upon such factors as the limited success in the litigation and the reasonableness of the claimed charges); *Gen. Elec. Co. v. Compagnie Euralair, S.A.*, 1997 U.S. Dist. LEXIS 19969 (S.D.N.Y. 1997) (reducing the fee request by 50% for, *inter alia*, excessive and duplicative hours billed); *N.S.N. Int'l v. DuPont*, 1996 U.S. Dist. LEXIS 832 (S.D.N.Y. 1996); *United States v. Gehl*, 1996 U.S. Dist. LEXIS 832 (N.D.N.Y. 1996) (court reduced attorney's fees because "the work performed appears to be duplicative, and the time spent on a considerable portion of the services rendered excessive").

Moreover, time entries must specify in detail the particular work performed so that the court may determine the nature of the work done, the need for it, and the amount of time reasonably required. *See Amato v. City of Saratoga Springs*, 991 F. Supp. 62 (N.D.N.Y. 1998). Where the documentation of hours is inadequate, the court should reduce the award accordingly. *Lake v. Schoharie Co. Comm'r of Social Srvcs.*, 2006 WL 1891141 (N.D.N.Y. 2006) (rejecting entries that "lack sufficient detail to enable the court to intelligently discern the reasonableness of the services performed").

The *Amato v. City of Saratoga Springs* case is instructive concerning the need for proper and complete time entries. There, Judge McAvoy, who was tempted to deny the fee request outright, reduced the claimed fees by 90%, largely because they were excessive and vague. In particular, the Court rejected charges such as "research" and "review research," among other entries, because those time charges were "vague and provided an inadequate basis for this court to determine the reasonableness of [the attorney's'] claimed hours." 991 F. Supp. at 65. It should be noted that the charges in the present case contain similar references to unidentified or undefined "research" and other equally vague tasks. (Dkt. No. 61-1). Under *Amato*, all such charges should be rejected on grounds that, "permitting plaintiff's counsel to recover on the basis of such vague entries would reward him for maintaining time records that complicate the court's task of assessing reasonable attorney's fees and augment the risk of error in the amount awarded." *Id*.

In this case, Plaintiff's attorneys permitted a **disbarred attorney** to charge for 448.8 hours of work, or 78.3% of the 573.2 hours purportedly expended during the appellate phase. (Dkt. No. 61-1). However, even if Mr. Sinker was a practicing attorney duly admitted to the bar, his entries would remain excessive. There is little, if any, explanation or specificity in his time entries as to what he did, other than "research" and "draft" the appellate brief and attend various internal conferences with Messrs. Deery and Kowalczyk. The hours expended by Mr. Sinker are grossly inflated.

Although Mr. Deery attempts to justify his own charges on grounds that "it is ethically incumbent upon licensed attorneys to review and take responsibility for the work performed by their paralegals" (Dkt. No. 61-1, ¶ 9), licensed attorneys are also ethically bound not to facilitate the unauthorized practice of law (*See* Point II, *supra*). There is little, if any, indication in the records submitted by Mr. Deery as to how much time he spent "supervising" Mr. Sinker's legal work. If this Court determines, as it should, that Plaintiff may not recover fees for the work performed by Mr. Sinker (see above), then it is axiomatic that Mr. Deery should receive no credit whatsoever for supervising, reviewing or otherwise editing Mr. Sinker's work product. At the very least, a significant, across-the-board reduction should be applied to all time entries.

Additionally, the time entries submitted by Plaintiff's counsel are vague, inadequate and contain many instances of "block billing," in which multiple charges are lumped together in one block without a breakdown of the specific time for each individual task.

Notwithstanding Plaintiff's failure to identify and remove improper time entries and unnecessary and unreasonable fees (including time related to prosecuting the cross appeal), Defendant has reviewed and set forth its specific objections with respect to each time entry for which Plaintiff seeks reimbursement. Attached to the Affidavit of Anthony J. Piazza, as Exhibit C, is a spreadsheet detailing Defendant's objections with respect to each time entry. For the reasons set forth on that spreadsheet, Plaintiff's fees, at a minimum, should be reduced by $90,543.00 because the time relates to work that is excessive and/or unnecessary, or the entries are vague and/or incomplete to allow a determination as to whether the work was appropriate.

The combination of block billing, excessive billing, redundant billing, vague billing entries, and the failure to segregate time, coupled with the fact that 78.3% of all work was performed by a disbarred attorney, militates strongly in favor of denying Plaintiff's Second Motion in its entirety. At the very least, the Court should use a significant "across-the-board" reduction of at least 90% as used by Judge McEvoy in the *Amato* case cited above.

C. The Fee Requested by Plaintiff's Counsel is Unreasonable

Finally, the hourly rates sought by Plaintiff - $300/hour for attorneys and $150/hour for a disbarred attorney – are wholly unreasonable. Moreover, this Court has already determined that a reasonable rate is $225.00 for an experienced attorney and $80.00 for a paralegal, which was affirmed on appeal. As such, even if this Court were to award fees to Plaintiff, these are the applicable rates that should be applied to any fee award.

It is well settled that the party seeking attorneys' fees must prove that his requested fee is "reasonable." *See Pino v. Locascio*, 101 F.3d 235, 237 (2d Cir. 1996). In determining whether the moving party has satisfied its burden, the court must calculate a "presumptively reasonable fee." *See Bergerson v. N.Y. State Office of Mental Health*, 652 F.3d 277, 289 (2d Cir. 2011).

Traditionally, courts have determined a "reasonable attorney's fee" by calculating the lodestar – the product of the number of hours required by the matter and a reasonable hourly rate. *See Millea v. Metro-North R. Co.*, 658 F.3d 154 (2d Cir. 2011). A reasonable hourly rate is "what a reasonable, paying client would be willing to pay, given that such a party wishes to spend the minimum necessary to litigate a case effectively." *Bergerson*, 652 F.3d at 289-290. The court must refer to "the prevailing [market rates] in the [relevant] community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Farbotko v. Clinton Cnty. of New York*, 433 F.3d 204, 208 (2d Cir. 2005).

A determination of the reasonable hourly rate "contemplates a case-specific inquiry into the prevailing market rates for counsel of similar experience and skill to the fee applicant's counsel [, which] may, of course, include judicial notice of the rates awarded in prior cases and the court's own familiarity with the rates prevailing in the district." *Farbotko*, 433 F.3d at 209. In *Lore v. City of Syracuse*, decided in 2012, the Second Circuit indicated that a trial court did not abuse its discretion when it found that "[t]he prevailing hourly rates in [the Northern District of New York]…are $210 per hour for an experienced attorney, $150 per hour for an attorney with more than four years of experience, and $120 per hour for an attorney with less than four years experience, and $80 for paralegals." 670 F.3d 127, 175 (2d Cir. 2012).

As noted above, this Court has already determined, which was affirmed on appeal, that the applicable hourly rates in this jurisdiction for handling this matter are $225.00 for an experienced attorney and $80.00 for a paralegal. It is respectfully submitted that this ruling constitutes the law of the case and must be adhered to in connection with this motion (to the extent that any fees are awarded). These rates are consistent with the rates that have been approved by other courts in this jurisdiction. *See e.g. Zhou v. State Univ. of New York Inst. Of Tech.*, 2014 U.S. Dist. LEXIS 176584 (N.D.N.Y. 2014) ($225/hour for lead attorney; $200/hour for a partner; $125 for an associate; $117.65 for another associate); *Dotson v. City of Syracuse*, 2014 U.S. Dist. LEXIS 59780 (N.D.N.Y. 2014) ($250/hour for attorneys and $80/hour for paralegals); *UFCW Local One Pension Fund v. Anami Foods, LLC*, 2013 U.S. Dist. LEXIS 132348, *14-15 (N.D.N.Y. 2013) (awarding fee rates of much less in ERISA litigation).

For the reasons set forth herein, even if this court is willing to entertain Plaintiff's motion for counsel fees, the requested fee rates by Plaintiff are unreasonable.

CONCLUSION

For the reasons set forth above and in the accompanying submissions, it is respectfully submitted that Plaintiff's Second Motion be, in all respects, denied in its entirety and with prejudice, and such other, further and additional relief that this Court deems just and proper, including, if this Court deems proper, Defendants' attorneys' fees, costs and disbursements for responding to Plaintiff's Second Motion.

DATED: April 7, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2015, I filed the foregoing document with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the following:

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